

NO. 82-1651

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In The
Supreme Court of the United States
October Term, 1983

CRISPUS NIX, WARDEN OF THE IOWA STATE
PENITENTIARY,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

Petitioner Crispus Nix, Warden of the Iowa State Penitentiary, respectfully submits this Reply Brief on the Merits in the above captioned matter, *cert. granted* 51 U.S. L.W. 3851 (U.S. May 31, 1983) (No. 82-1651).

ARGUMENT

- I. The Respondent Incorrectly Asserts That Adoption Of An Inevitable Discovery Exception To The Exclusionary Rule By This Court Will Provide An Incentive For Police Officers To Act Unlawfully.**

The Respondent claims that this Court's adoption of the widely accepted inevitable discovery exception to the

exclusionary rule will be an incentive for unlawful police conduct. (Resp. Br. at 12, 15, and 17.) This conclusion is inconsistent with the record in this case, defies common sense, and is contradicted by recent experience in the federal courts.

A. Respondent ignores the fundamental fact that the tainted fruits of Leaming's investigative activity—namely, the fact that Williams himself actually led police to the body of Pamela Powers and therefore had personal knowledge of the body's location, has been suppressed. *Brewer v. Williams*, 430 U.S. 387 (1977). Since the State did not purge the taint of Leaming's unlawful activity from this evidence by independent source, attenuation, or inevitable discovery, this highly relevant factual material has been excluded from trial by traditional operation of the exclusionary rule.

Respondent really is arguing that the State must be affirmatively punished for constitutional infractions, however technical in nature. But this Court has never accepted a punishment theory of the exclusionary rule. Rather, this Court has simply sought to put the State in the same position it would have been in if the Constitution had been followed. See *Johnson, The Return of the Christian Burial Speech Case*, 32 Emory L. J. 349, 366 (1983).

Nothing in *New Jersey v. Portash*, 440 U.S. 450 (1979), *United States v. Henry*, 447 U.S. 264 (1980), or *Estelle v. Smith*, 451 U.S. 454 (1981), supports Respondent's punishment theory. These cases simply traditionally apply the exclusionary rule to the direct fruits of illegal conduct where there is no showing of attenuation, independent source, or inevitable discovery.

B. Even if the Court embraces an inevitable discovery exception, common sense tells us that police will be powerfully deterred from unlawful conduct. If a police officer uncovers through unlawful activity evidence that *might* have otherwise been discovered through lawful means, but the State cannot meet its burden of showing that the evidence actually would have been found, the evidence will be excluded. Thus, under the rule advanced by Petitioner, a police officer will be encouraged to adhere closely to legal restrictions in order to avoid the risk of thwarting the investigation. Indeed, the history of this notorious case is a stern reminder of the tremendous risks incurred when police officers engage in investigative conduct later found to be unconstitutional by the courts.

C. The experience of the federal courts with the inevitable discovery exception undermines Respondent's contention that the theory is an incentive for unlawful police behavior and opens the floodgates to intentional use of unconstitutional conduct to bootstrap evidence into the record. If adoption of the inevitable discovery rule in practice had the effects solemnly pronounced by the Respondent, the federal courts, in the common law tradition, would be reacting by cutting back or eliminating the exception altogether. The trend, however, is exactly in the opposite direction. *See* Petitioner's Brief at 18 n. 16.

II. Contrary To Respondent's View, The Core Notion Of Fairness At Trial That Inheres In The Sixth Amendment Right To Assistance Of Counsel Would Not Be Offended By Application Of The Inevitable Discovery Exception In This Case.

Respondent maintains that adoption of the inevitable discovery exception to the exclusionary rule will unconsti-

tutionally invade his right to a fair trial. (Resp. Br. at 5-9.) This contention is without foundation for several reasons.

A. The evidence which the State seeks to admit into evidence—testimony regarding the obvious death of Pamela Powers and the condition of her body—is highly probative and reliable. The evidence establishes, beyond peradventure, that Pamela Powers has indeed been the victim of a brutal murder. It is simply not unfair in a criminal trial to admit into evidence testimony regarding the body of a murder victim which would have been discovered notwithstanding investigative conduct later found to be unconstitutional by the courts.

B. The ability of counsel for Respondent to cross-examine witnesses for the State who testified about the physical condition of the body was not in any sense impaired by application of the inevitable discovery exception. In *United States v. Wade*, 388 U.S. 227 (1967), this Court held the right to counsel does not attach when the state conducts physical examination of a human body. The Court observed that “knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough that the accused has the opportunity to meaningful confrontation of the Government’s case at trial through the ordinary processes of cross-examination of the Government’s expert witnesses and the presentation of the evidence of his own experts.” 388 U.S. at 228.

C. Respondent incorrectly implies that a per se exclusionary rule is necessarily justified when Sixth Amendment infractions occur. (Resp. Br. Part IA at 5, 7, and 8.) But in Respondent’s own cited case, *United States*

v. Wade, this Court notes that "[w]here, as here, the admissibility of evidence related to the lineup identification itself is not involved, a *per se* rule of exclusion would be unjustified (citation omitted)." 388 U.S. at 240. Similarly, evidence involved in this case is not that which necessarily flows only from the illegal interrogation itself. As a result, a *per se* exclusionary rule is inappropriate.

Indeed, *Wade* is unmistakable authority for the proposition that *per se* application of the exclusionary rule does not automatically apply simply because Sixth Amendment rights have been found to be violated by the Courts. In a *Wade* type situation, an identification in violation of the right to counsel has occurred which cannot be erased from the mind of the prospective witness. The taint can be purged from the subsequent identification, however, if the prosecution can clearly show independent origins of the identification to be used at trial. In reaching this conclusion, it is instructive to note that the Court cites as persuasive precedent key search and seizure authorities that establish the principle that where there is sufficient means to free evidence from the taint of underlying illegality, society's interests in effective law enforcement outweigh the deterrent purposes of the exclusionary rule. See 388 U.S. at 240-41, citing *Nardone v. United States*, 308 U.S. 338, 341 (1939), *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Respondent's position that deterrence/balancing concepts have no application in Sixth Amendment settings is thus incorrect. (Resp. Br. at 5.)

III. The Factual Findings Of Both State And Federal Trial Courts That The Body Of Pamela Powers Would Have Been Discovered In Any Event Has Ample Support In The Record.

Respondent undertakes the difficult task of penetrating the findings of both state and federal trial courts that the body of Pamela Powers would have been discovered by lawful means. These findings, however, are strongly supported by the evidence.

A. There can be little doubt that the search for Pamela Powers would have continued into Polk County had the body not been discovered through Detective Leaming's activity. Police knew that Williams, with a blanket with legs dangling, fled from the Des Moines YMCA in an auto, eventually surrendering to police in Davenport. *Brewer v. Williams*, 430 U.S. 387, 390 (1977). Since clothing of Pamela Powers was discovered at a rest stop near Grinnell on Interstate 80, the search was originally concentrated in Poweshiek County, where Grinnell is located, and moved in a westerly direction through Jasper County toward Polk County where Des Moines is located. (App. 33-4.) The search was conducted approximately seven miles north and south of Interstate 80. (App. 32.) Over 200 volunteers participated in the activity under instructions to scour all roads, ditches, culverts, or any other places where a small child could be secreted. (App. 32.)

Obviously, the actions of police demonstrated a clear commitment to the theory that the body of Pamela Powers may have been disposed in the vicinity of Interstate 80 somewhere between Des Moines, where Williams was seen with his suspicious bundle, and near Grinnell, where the articles of clothing were discovered. If the body had not been discovered, it is hard to imagine that the police would have called off the search and not pressed their search to its logical geographic conclusion—the YMCA in Des Moines, the origin of Williams' flight. As noted by the state trial court, "the search clearly would have been tak-

en up again where it left off, given the extreme circumstances of the case, and the body would have been found in short order." (App. 86.) *See also Williams v. Nix*, 528 F.Supp. 664, 671 (S.D. Iowa 1981).

In order to undermine the identical findings of the state and federal trial courts, the Respondent attempts to attack the credibility of Detective Ruxlow, who testified emphatically and persuasively in both forums that law enforcement officers intended to continue the search for Pamela Powers' body into Polk County had the body not been discovered. (App. 36, 144-145.) Respondent asserts that "Ruxlow demonstrated a lack of candor at the [state] suppression hearing when he testified that State's Exhibit D (introduced in the District Court as Habeas Exhibit 5, App. 108), a photograph taken at the scene in which the body is plainly visible, showed the body 'exactly as it was found' without any snow removed." (Resp. Br. at 20.)

Respondent's characterization of the Ruxlow testimony is a misrepresentation of the record and should be dismissed summarily here. In fact, Ruxlow testified that Exhibit C, not Exhibit D as claimed by Respondent, showed the body "exactly the way it was found" when he was asked, "Has snow been removed or trampled down [in Exhibit C] as indicated in State's Exhibit D?" (App. 38-39.) Ruxlow's testimony was entirely consistent with that of a previous witness who testified that Exhibit C (Habeas Exhibit 3, App. 107) showed the body as it was discovered, and that in Exhibit D, the photo showed "some movement of snow, tracks, et cetera." (App. 5.) The state trial court, and attorneys for the Respondent, were thus fully and accurately apprised as to what the photos purported to represent, and Ruxlow's testimony, which

demonstrated to the state trial court that he was "an intelligent and organized man with experience in the area of searches," has not been belatedly impeached. (App. 86.)

B. Respondent's contention that the body would not have been discovered even if the search had been continued into Polk County is without merit. Respondent first argues that even if searchers had emerged from their vehicles and looked in the area near the culvert, the body would not have been discovered. (Resp. Br. at 33.) In any case, Respondent maintains that searchers would not have emerged from their vehicles to examine the area near the culvert where the body was found. (Resp. Br. at 34.)

The Respondent's argument that the body would not have been found by searchers who emerged from their vehicles and examined the area around the culvert is unpersuasive. State's Exhibit C (Habeas Corpus Exhibit #3, App. 107) is a photograph which both state and federal courts found depicted the culvert area and the body as it was originally discovered by law enforcement officials.* As can be seen from the photograph which plainly shows the body of the girl against the culvert, anyone who came down into the ditch to look at the culvert would have found the body. See *State v. Williams*, 285 N.W. 2d 248, 262 (1979) (Cert. App. 49), *Williams v. Nix*, 528 F. Supp. 664, 671 (S.D. Iowa 1981).

*Respondent's claim that State's Exhibit C is not a photograph of the site undisturbed by police, Resp. Br. at 33 n. 28, is contrary to the findings of the state and federal courts and not supported by the evidence. (App. 5, App. 35.) Even Respondent's citation to the record, which describes an original photograph as showing a partially nude body partially covered with snow, supports the view that State's Exhibit C is the undisturbed photograph. (App. 124.) This description resembles State's Exhibit C far more than it does Habeas Exhibit #1.

Respondent further contends that because a series of photographs (Habeas Exhibits 7, 8, 9, App. 109-111) apparently taken from the road near the site where the body was found do not clearly show a "culvert or any outbuilding of an abandoned farm," the area would not have been subject to a pedestrian search. (Resp. Br. at 34.)

Respondent ignores, however, the fact that the searchers were explicitly instructed to leave their vehicles and walk through any roadside ditches where visibility was impaired not simply because of culverts or outbuildings but for any reason, including the existence of weeds. (App. 45.) In short, the searchers were to closely examine any places "where a small child could be secreted." (App. 32.) The existence of brush and a clump of trees, plainly visible in the photographs, would have caused searchers to stop their vehicles and emerge from them for a closer look.

In any case, even if searchers only left their vehicles to examine culverts or outbuildings, the Respondent's photographs show that the landscape contained typical physical characteristics that would have alerted searchers to the presence of a culvert. The cluster of trees and brush in Habeas Exhibits 7, 8, and 9 (App. 109-111) demonstrate unusual water flow in the area, a key indication of a culvert. (App. 160.) And, the dip in the landscape on the opposite side of the road, as readily seen in Habeas Exhibit 8, is strongly suggestive of a local water drainage system. The state and federal trial courts cannot be faulted for concluding that searchers would have discovered the culvert and closely examined its immediate surroundings.

C. Even if one accepts Respondent's conclusions, flatly contradicted by the record, that the search would not have continued into Polk County, or, in the alternative, that the body would not have been found immediately had the search continued, it is hard to imagine that the half naked body lying along the culvert would have gone undiscovered for very long, particularly when police had strong suspicions that the body was in the area. *See Johnson, supra*, at 373. The record shows and the state trial court found that forensic evidence relating to the condition of the body would have been preserved until the break of frost in April. (App. at 64, 87.) In any case, even if the precise cause of death might have been obliterated by a belated police discovery of the body, the State clearly would have been able to show (a) the fact of her death, and (b) strong evidence of sexual assault or foul play as revealed by her half naked body. Application of the inevitable discovery exception in this context would not involve the extreme speculation that sometimes infects "hypothetical inevitable discovery cases." *See* Petitioner's Brief at 14.

IV. Respondent's Contention That A Standard Other Than Preponderance Of Evidence Is Required For Invocation Of The Inevitable Discovery Exception Is Inconsistent With Analogous Precedent Of This Court.

A. Respondent's "clear and convincing" standard for application of the inevitable discovery exception to the exclusionary rule, Resp. Br. at 31 n.16, is contrary to this Court's traditional approach to application of similar exceptions. *See Alderman v. United States*, 394 U.S. 165, 183 (1969); *Lego v. Twomey*, 404 U.S. 477, 486-87 (1972).

B. Respondent's effort to extract a "clear and convincing" evidence standard for application of inevitable discovery from *U.S. v. Wade*, 388 U.S. 227 (1967), is without merit. (Resp. Br. at 31, n.16.) In *Wade*, the Court was critically concerned that a defendant's right to meaningfully cross-examine an identifying witness could be substantially impaired by counsel's absence at a pretrial lineup. 388 U.S. at 224. The Court stressed that variance of eyewitness identifications and the great potential of improper influence affecting the fairness and accuracy of subsequent in trial identification. 388 U.S. 228-339. Because pretrial misidentifications can thus fundamentally impair the reliability of the fact finding process, an approach stiffer than the traditional preponderance of evidence standard was applied in this limited setting.

Here, of course, counsel for Respondent had complete ability to cross-examine the State's witnesses testifying about the location and condition of the body. As a result, no threat to the accuracy of the fact finding process is present which requires departure from the preponderance of evidence test. As this Court held in *Lego v. Twomey*, where an issue considered in an admissibility hearing, like in this case, "has nothing to do with improving the reliability of jury verdicts," the preponderance of evidence standard is constitutionally sufficient. 404 U.S. at 486.

V. Contrary To The Position Of The Respondent, The State Met Its Burden In Showing Absence Of Bad Faith.

A. The Respondent wrongly states that this Court found an agreement between Detective Leaming and Respondent's attorney that Leaming would bring Respond-

ent back from Davenport without questioning him. (Resp. Br. at 24.) This Court in *Brewer*, as the Respondent's own citations show, made no such finding. The Court in *Brewer* carefully refrained from concluding that Leaming himself had agreed to anything. The Court found only an agreement between "Des Moines police officials," 430 U.S. at 391 or "appropriate police officials," 430 U.S. at 410 (Powell, J. concurring), or "Iowa law enforcement authorities," 430 U.S. at 415 (Stewart, J. concurring). The record in *Brewer* plainly prevented a more definitive approach with respect to Leaming's understanding or participation in the agreement. See, Kamisar, *Forward: Brewer v. Williams, A Hard Look at a Discomfiting Record*, 66 Geo. L. J. 209, 212-213 (1977). See also Johnson, *The Return of the Christian Burial Speech Case*, 32 Emory L. J. 349, 369-70 (1983).

B. Respondent's claim that this Court's two sentence per curiam opinion in *McLeod v. Ohio*, 381 U.S. 356 (1965), defeats any claim of absence of bad faith on the part of Leaming is misplaced. In *McLeod*, the defendant was *not* represented by counsel, had *not* requested counsel, and apparently had *not* been advised of his right to counsel. See *State v. McCleod*, 203 N.E. 2d 349, 353 (Ohio 1964). Under the specific factual circumstances, a knowing and voluntary waiver of the right to counsel simply could not be demonstrated. As the record in *Brewer* demonstrates, however, the respondent had repeatedly been advised of his right to counsel, had in fact engaged legal counsel, and knew of his right to remain silent. As a result, *McLeod* was not a controlling precedent on the question of whether the *Massiah* doctrine applied where a defendant, fully ad-

vised of his Sixth Amendment right to counsel and demonstrating his ability to exercise his rights, reveals incriminating information to a person the defendant knows to be a police officer. As Justice Blackmun later observed in a post *Brewer* case where a defendant had retained counsel, the "teeter-tottering" in *Massiah* over the importance of a defendant's awareness that a person is a government agent would have been an issue of "some importance" but for *Brewer*. See *United States v. Henry*, 447 U.S. 264, 284 (1980) (Blackmun, J., concurring).

C. Respondent argues that Leaming's distinction between direct questioning of a suspect and conversation is constitutionally irrelevant. (Resp. Br. at 26.) That may have been true in the narrow context of issues presented to this Court in *Brewer*, but the Court is now confronted with the totally different question of whether Leaming believed or could have reasonably believed his conduct was constitutional. The four person minority in *Brewer* and the majority opinion in *Rhode Island v. Innis*, 446 U.S. 232 (1980), conclusively demonstrate that this question must be answered affirmatively.

VI. Contrary To Respondent's Argument, Application Of Stone v. Powell In This Case Cannot Be Defeated On The Ground That Respondent Lacked A Full And Fair Opportunity To Litigate The Admissibility Issue In State Court.

A. Respondent's contention that the state trial court relied on "testimony that was false and seriously misleading," (Resp. Br. at 41) with respect to various photographs

is plainly incorrect and need not be discussed further. *See* Part III, *supra*.

B. The Respondent suggests (Resp. Br. at 41) that the Iowa Supreme Court, in a passing sentence, appeared to believe incorrectly that a photograph showing the left leg of the body in midair represented the scene as it was originally found by police officers. *State v. Williams*, 285 N.W. 2d 248, 262 (1979) (Cert. App. 49). But the Iowa Supreme Court clearly found, in the alternative, that even if the body could not be seen readily from the roadway, as is the thrust of Respondent's argument, the body of Pamela Powers still would have been discovered. As the Iowa Supreme Court noted, and State's Exhibit C (Habeas Exhibit #3, App. 107) clearly demonstrates, "it would have been virtually impossible for anyone who came down into the ditch to look into the culvert, as the searchers were doing, to fail to see the body." *Id.*

The federal district court was not impressed with Respondent's effort to relitigate the issue. Observing that new photographic evidence introduced in the habeas proceeding that was not presented to the state court "neither adds much to nor subtracts much from the suppression hearing evidence," *Williams v. Nix*, 528 F. Supp. at 671 n. 6, (Cert. App. A-79.), the Court found that, while much of the body was covered with snow, "her face and part of her brightly colored striped shirt were not touched by snow and were completely exposed to the view of any person looking at the end of the culvert. The searchers were going into the ditches to look into all culverts, and they would have searched along the road where the culvert and body were located." *Id.* (Cert. App. at 80.) Under

the circumstances, it cannot be claimed that Respondent lacked a full and fair opportunity to litigate the suppression issue in state court.

CONCLUSION

For all the above reasons, and for the reasons expressed in the Petitioner's Brief, the ruling and decision of the United States Court of Appeals for the Eighth Circuit in the above proceeding must be reversed.

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